IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 30, 2001

STATE OF TENNESSEE v. COLLIS BRANCH

Direct Appeal from the Criminal Court for Knox County
No. 57979 Richard Baumgartner, Judge

No. E2001-00711-CCA-R3-CD
December 10, 2001

This appeal arises from a default judgment entered in 1995 in the Knox County Criminal Court declaring the Appellant, Collis Branch, a motor vehicle habitual offender. Tenn. Code Ann. § 55-10-603. On appeal, Branch contends that the trial court erred in denying his Rule 60, Tennessee Rules of Civil Procedure, motion to set aside the default judgment upon grounds that the judgment was void. In support of this argument, he contends that the default judgment was obtained without complying with Rules 5,12, 55 and 58 of the Tennessee Rules of Civil Procedure. After review, we conclude that Branch's motion, which was filed in January of 2001, was not filed within a "reasonable time," as required by Rule 60.02, Tennessee Rules of Civil Procedure. Accordingly, the decision of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

DAVID G. HAYES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and JOHN EVERETT WILLIAMS, JJ., joined.

Mark E. Stephens, District Public Defender, Paula R. Voss, Aubrey Davis, Assistant Public Defender, Knoxville, Tennessee, for the Appellant, Collis Branch.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Kathy D. Aslinger, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip Morton, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

On March 22, 1995, the Knox County District Attorney General filed a petition requesting that the Appellant be declared a motor vehicle habitual offender. Accompanying the petition was a "show cause" order, directing the Appellant to appear on April 11, 1995, to show cause as to why

he should not be found a habitual offender. A copy of the petition and order was served on the Appellant on April 4, 1995. The Appellant failed to appear at the scheduled April 11, 1995, hearing. A default judgment signed by the trial court on April 12, 1995,found the Appellant to be a motor vehicle habitual offender. The default judgment was filed by the clerk for entry on April 19, 1995. The district attorney general certified by means of a "Certificate of Service" that a copy of the default judgment was sent by mail to the Appellant on April 12, 1995.

On January 9, 2001, the Appellant filed a motion to set aside the default judgment pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Hearings on the motion were held on January 26, 2001, and February 16, 2001. After hearing arguments, the trial court denied the Appellant's motion, finding that it was not filed within a "reasonable time," as required by Rule 60.02, Tennessee Rules of Civil Procedure.

I. Whether the Judgment is Void Pursuant to Rule 58

The Appellant argues that the default judgment entered in this case is void because it does not comply with Rule 58 of the Tennessee Rules of Civil Procedure, which provides in relevant part as follows:

> Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:
>
> (1) the signatures of the judge and all parties or counsel; or
>
> (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel; or
>
> (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

The trial court found, as supported by the record, that the default judgment complied with the second provision of Rule 58, *i.e.*, that the judgment was marked on its face as filed for entry, that the judgment contained the signature of the judge, the signature of the district attorney general, and a certificate by the district attorney that the judgment had been served on the Appellant. The Appellant argues, however, that the certificate of service signed by the district attorney stating that a copy of the default judgment was mailed to the Appellant on April 13, 1995, is void because "[Rule 5] requires that service of pleadings and other papers be made to a person's last known address." In effect, the Appellant argues that the judgment is void because the certificate did not include the address to which the judgment was mailed and is void because no return receipt was introduced to prove the Appellant ever received a copy of the judgment.

Rule 5.02 of the Tennessee Rules of Civil Procedure provides in relevant part that "service . . . upon a party shall be made by delivering to him or her a copy of the document to be served or by mailing it to such person's last known address." The petition listed the Appellant's current address as 231 Oglewood Street, Knoxville, Tennessee, 37917. Moreover, Rule 5.03 of the Tennessee Rules of Civil Procedure provides, in relevant part, that proof of service "may be by certificate of a member of the bar of the court or by affidavit of the person who served the papers, or by any other proof satisfactory to the court." In this case, proof of service was properly provided by certificate of the district attorney general. We find that neither Rule 5.02 nor 5.03 of the Tennessee Rules of Civil Procedure specifically requires, contrary to the Appellant's assertions, that the physical address be included for service to be valid. Furthermore, we note that the Appellant does not dispute the fact that he received a copy of the default judgment by mail; rather, he argues noncompliance of various procedural rules. Indeed, the record reflects that the Appellant was served a copy of the order directing him to appear on April 11, 1995, only eight days prior to the date the judgment by default was mailed to him. Accordingly, we find the judgment by default was proper and became a final judgment for purposes of appeal upon its entry on April 19, 1995.

II. Timeliness of Appellant's Motion to Void Judgment

Almost six years later, on January 9, 2001, the Appellant filed his motion to void the judgment pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure, which provides:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake . . . ; (2) fraud . . . ; (3) *the judgment is void*; (4) the judgment is satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated . . .; or (5) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time*, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken . . .

(emphasis added). After hearing the Appellant's argument, the trial court denied the Appellant's motion to void the judgment and found:

> This is the problem. I do not believe this is a void judgment . . . I believe that it is a judgment you might have been able to attack and obviously, of course, denied like a default judgment. However, what has happened in this case is that [the Appellant] was served, and within less than 30 days a default judgment was taken against him. He was served with a copy of that default judgment. So he knew that the default judgment had come down against him. Not only did he not come into Court and do anything about it, but in fact he was in Court time and time and time again after the 11th of April, 1995 . . . My point is that he didn't complain. He didn't raise any issue in this case until he had subsequent problems, until something happened. I think he was waited too long to raise this issue. I deny your motion.

Initially, we are constrained to note various procedural errors which occurred in the process of obtaining the judgment by default. First, the trial court erred by ordering the Appellant to appear on April 11, 1995, which was less than thirty days from the date he was served [April 4, 1995]. Tennessee Code Annotated § 55-10-608(a) and (b) provides:

> (a) Upon the filing of the petition, the court shall make an order directing the individual (defendant) named therein to appear before the court to show cause why the defendant should not be barred from operating a motor vehicle on the highways of this state.
>
> (b) The order of the court shall specify a time certain, *not earlier than thirty (30) days after the date of service of the petition and order*, at which the defendant shall first appear before the court.

(emphasis added); *see also* Tenn. R. Civ. P. 12. Furthermore, the record does not reflect that a motion for default judgment was made by the State nor is there any reference within the final order that judgment was obtained by default.[1] Finally, we note that the State failed to present an affidavit of entitlement to a default judgment or present proof otherwise as required by Rule 55.01 of the Tennessee Rules of Civil Procedure. Notwithstanding these errors, the determinative issue on appeal is whether the trial court abused its discretion by denying the Appellant's motion to void the judgment pursuant to Rule 60.02, given the Appellant's long delay in seeking relief.

Relief under Rule 60.02 is considered "an exceptional remedy." *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289, 294 (Tenn. 1992). Thus, "the party seeking relief from a judgment bears a heavy burden." *Joe Trammell v. George W. Pope, Jr.*, No. M1999-00886-COA-R3-CV (Tenn. Ct. App. 2000), *perm. to appeal denied*, (Tenn. Mar. 5, 2001). The scope of review on appeal for relief from a judgment pursuant to Rule 60.02 is limited to whether the trial judge abused his discretion. *Banks v. Dement Const. Co., Inc.*, 817 S.W.2d 16, 18 (Tenn. 1991). A discretionary judgment of the trial court will not be reversed for abuse of discretion unless it, "'affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining.'" *Marcus v. Marcus*, 993 S.W.2d 596, 601 (Tenn. 1999)(quoting *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)).

Furthermore, when seeking to set aside a judgment under Rule 60.02, the moving party has the burden to prove "that he is entitled to relief, and there must be proof of the basis on which relief is sought." *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000); *Banks*, 817 S.W.2d at 18. The moving party must establish by clear and convincing evidence that relief from the judgment is warranted. *Duncan v. Duncan*, 789 S.W.2d 557, 563 (Tenn. Ct. App. 1990), *perm. to appeal denied*, (Tenn., May 14, 1990). Indeed, Rule 60.02 was designed to strike a proper balance between the competing principles of finality and justice. *Banks*, 817 S.W.2d at 18 (quoting *Jerkins*

[1] To the contrary, the judgment states that the Appellant "personally appeared before the Court." Both the State and the Appellant agree that the Appellant made no appearance in this case.

v. McKinney, 533 S.W.2d 275, 280 (Tenn. 1976)). In *Banks*, our supreme court examined the purpose of Rule 60.02 and found:

> Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules . . . Because of the importance of this "principle of finality," the "escape valve" should not be easily opened.

Id. (quoting *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991)).

Again, we emphasize that a motion for relief from a civil judgment or order based upon voidness must be made within a "reasonable time." Tenn. R. Civ. P. 60.02. In this case, the Appellant sought no relief from the default judgment entered against him until five years and nine months after its entry. The record reveals that the Appellant was served on April 4, 1995, with notice to appear on April 11, 1995, to show cause as to why he should not be declared a motor vehicle habitual offender and he chose not to appear or respond to the pleadings. The record reflects that the Appellant's response is now prompted by the fact that he has since been indicted as a motor vehicle habitual offender for violating the order which he currently challenges. We are far from persuaded that the almost six-year delay in bringing his motion to void the judgment is reasonable under Rule 60.02. *See State v. Michael Shawn Shofner*, No. E2000-00993-CCA-R3-CD (Tenn. Crim. App. at Knoxville, May 1, 2001)(motion to void HMVO judgment not timely where defendant did not seek relief until three years and four months after date of entry); *State v. Michael Samuel Eidson*, No. 03C01-9711-CR-00506 (Tenn. Crim. App. at Knoxville, Mar. 24, 1999)(motion to void HMVO judgment not timely where defendant did not seek relief until three years after date of entry and no reason was provided for the delay); *State v. Ronald D. Correll, Jr.*, Nos. 03C01-9707-CC-00295, 03C01-9801-CC-00014 (Tenn. Crim. App. at Knoxville, Oct. 21, 1998), *perm. to appeal denied*, (Tenn. 1999)(motion to void HMVO judgment not timely where defendant did not seek relief until twenty months later when he was charged with violation of the order). A delay may be deemed unreasonable where the defendant knows of the judgment against him and offers no reason for his failure to timely challenge the judgment. *State v. Michael Samuel Eidson*, No. 03C01-9711-CR-00506 (Tenn. Crim. App. at Knoxville, Mar. 24, 1999)(citing *Magnavox Co. v. Boles & Hite Constr. Co.*, 583 S.W.2d 611, 613-14 (Tenn. App. 1979)).

After review, we cannot conclude that the trial court's denial of the Appellant's motion to void the judgment amounted to an abuse of discretion. Accordingly, we find no error in the court's decision to deny relief from the judgment pursuant to Rule 60.02, Tennessee Rules of Civil Procedure.

CONCLUSION

We find that the Appellant's almost six-year delay in bringing his motion to set aside the judgment was not filed within a "reasonable time" as required by Rule 60.02 of the Tennessee Rules of Civil Procedure. As such, the judgment of the Knox County Criminal Court is affirmed. Costs are assessed against the Appellant, Collis Branch, for which execution may issue, if necessary.

_____

DAVID G. HAYES, JUDGE